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No. 88-1546

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

PACIFIC MUTUAL LIFE INSURANCE COMPANY, *et al.*,
Petitioners,

v.

HARRIETTE TURNBOW,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Nevada

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

As the Petition demonstrates, the Nevada Supreme Court's decision, by labeling a garden variety insured health care plan "non-ERISA governed," deliberately undermines Congress' clearly expressed intent to impose uniform federal regulation over *all* employer-sponsored health care plans, self-funded and insured alike. ERISA section 3(1), 29 U.S.C. § 1002(1). This parochial decision, which engenders further conflict and confusion in the lower courts on this critical ERISA coverage and preemption issue, intentionally serves to nullify ERISA

and *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), for the overwhelming majority of American health care plans. In addition, by excluding the working self-employed from ERISA's civil enforcement provisions, the decision creates a serious dysfunction in the statute and will cause the "mutually exclusive pockets of federal and state jurisdiction within a plan" against which this Court warned in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987), and *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 99, 107-08 (1983).

Essentially ignoring these important considerations of national uniformity and ERISA's intended preeminence, respondent argues, without any support in the statute or legislative history, that Congress intended very restrictive health care plan and civil enforcement coverage. (Opposition at 8-9). Unless overturned, this erroneous interpretation of ERISA health care regulation—which reflects a sharp conflict among at least five Circuits (Petition at 16-19)—will lead to 50 differing and conflicting sets of regulation by the states not merely for varying health care plans, but also for individual participants within these plans—the very "patchwork scheme of regulation" that ERISA was intended to avoid. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987).

Consequently, the *Turnbow* decision is not of limited effect, as respondent argues. (Opposition at 8-9). To the contrary, since over 84% of employer-sponsored health care plans are insured, and 93% of all employers, self-funded and insured alike, delegate claims administration (Petition at 26-27), the negative impact of *Turnbow* and its recent California counterpart, *Sayble v. Blue Cross of Southern California*, 256 Cal. Rptr. 820 (Cal. Ct. App. 1989), will continue to be extraordinary indeed.

Contrary to respondent's view, this Court's recent unfunded vacation pay decision in *Massachusetts v.*

Morash, 57 U.S.L.W. 4429 (April 18, 1989), does not support her position at all. (Opposition at 7-8). Instead, it strongly confirms petitioners' ERISA coverage and preemption arguments. First, this Court observed that the reasonable views of the Secretary of Labor are entitled to "deference," citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984), among other cases. *Id.* at 4431. As shown in the Petition at 11-14, the Secretary's regulations governing insured health care plans in 29 C.F.R. § 2510.3-1(j) (1987)—which the Nevada Supreme Court ignored—plainly establish that The Bottle Stop's plan was ERISA-regulated. Second, this Court concluded that because ordinary vacation benefits are types of regular compensation that are typically "fixed, due at known times, and do not depend on contingencies outside the employee's control," they present none of the employee welfare benefit plan risks that ERISA was intended to address. In contrast, the Court observed that ERISA section 3(1) regulates plans which provide certain *health care* benefits —including "medical, sickness [and] accident . . . benefits"—which generally "accumulate over a period of time and are payable only upon the occurrence of a contingency outside of the control of the employee." *Id.*[1]

Respondent essentially argues that The Bottle Stop's health care plan, which covered her and three common law employees, was not ERISA-regulated because it was insured and was administered primarily by third par-

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[1] The Court also quoted with approval from the Secretary of Labor's explanation why the proposed regulations excluded certain types of regular compensation, including vacation leave, in contrast to "*hospitalization*" benefits, from ERISA's definition of "employee welfare benefit plan":

> [P]aid vacations . . . are not treated as employee benefit plans because they are associated with regular wages or salary, rather than *benefits triggered by contingencies such as hospitalization.* (emphasis added). *Id.* at 4431.

ties.[2] (Opposition at 8). Respondent contends, at core, that ERISA was not intended to regulate the administration, fiduciary responsibility, and reporting and disclosure for *insured* health care plans. Her argument, however, is completely refuted by ERISA's broad definition of "employee welfare benefit plan" as including "*any*" health care plan funded "*through the purchase of insurance or otherwise*" (emphasis added) in section 3(1), by the Secretary of Labor's governing regulations, and by ERISA's regulatory provisions which place the duty of reporting and disclosure[3] on the person who serves as "administrator," and its fiduciary responsibility provisions on "named fiduciaries" and trustees, sections 101, 103-104, 402-412, §§ 1021, 1023-24, 1102-1112; *see also* sections 502, 503, §§ 1132, 1133. In addition, Congress phrased ERISA's preemption clause, and the administration and civil enforcement provisions, very broadly, and

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[2] The uncontroverted record, moreover, showed that the plan was established not by Turnbow as an individual, but by The Bottle Stop as an employer. The Bottle Stop submitted the application and not only selected the "American Series Plan" as one of several programs offered by B.E.S.T. and paid all insurance premiums for over eight years, but participated in the plan's administration by obtaining enrollment cards from all four individuals, having its insurance agent explain the coverage to the participants, and by paying an enrollment fee and monthly service charges. (Petition at 3-4).

[3] Contrary to respondent's view, these reporting and disclosure requirements—for insured plans established by small employers—are essentially *de minimis*. (Opposition at 8). The Department of Labor has exempted insured welfare plans covering fewer than 100 participants from various of ERISA's reporting and disclosure requirements, including the filing of the plan description, the summary plan description, the description of material modifications, the annual report, and a terminal report. 29 C.F.R. § 2520.104-20(a) (1987). A similar exemption applies to welfare plans with fewer than 100 participants when they are part of a group insurance arrangement (two or more unaffiliated employers) which uses a trust or other legal entity such as a trade association as the holder of the insurance contracts and the conduit for the payment of premiums to the insurer. 29 C.F.R. § 2520.104-21, .104-43 (1987).

did not limit them in any way to *employer* conduct. Sections 514(a), 501-504, 510-511, §§ 1144(a), 1131-1134, 1140-1141.

Consequently, ERISA coverage of insured health care plans is fully consistent with the regulatory concerns addressed by this Court in both *Morash* and *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987): the promotion of efficient administration through the preemption provision, and the protection of plan assets through the fiduciary liability provisions.[4] The efficient administrative scheme which Congress intended to promote in enacting ERISA's preemption provision, and the Act's fiduciary concerns, would be impermissibly burdened by conflicting state regulation of *health care* plans regardless of whether the covered plan is self-funded or insured, and an employer or an insurance company serves as administrator or claims review fiduciary under ERISA section 503, 29 U.S.C. § 1133.

Most significantly, respondent ignores the destructive impact that *Turnbow* and *Sayble*—both of which are the opportunistic progeny of the conflict and confusion created by *Taggart Corp. v. Life & Health Benefits Admin. Inc.*, 617 F.2d 1208 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981)—will have on the continued provision of health insurance to families across the country.

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[4] The reason that this Court determined in *Fort Halifax* that the Maine severance pay statute did not implicate ERISA's preemption and fiduciary concerns was that the benefit mandated by the Maine statute required no administration. Under *Fort Halifax*, whether the concerns of ERISA's preemption and fiduciary provisions are implicated turns on the existence of an administrative scheme—which in case of health care plans would include procedures for enrolling new participants, advising them of their rights and, most importantly, for the process and review of claims—not on the duration of the plan, how it is funded, or who administers it. *Id.* at 9.

These decisions, by exposing insured health care plans to conflicting regulation and suits under state law, will lead to increased transaction costs and hence to a reduction in benefits, a self-funding of plans, or to their abandonment altogether. *See amicus* brief filed by the Solicitor General, on behalf of the United States, at 7-8, in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 1 (1987). As this Court stated in *Fort Halifax*, "[f]aced with the difficulty or impossibility of structuring administrative practices according to a set of uniform guidelines, an employer may decide to reduce benefits or simply not to pay them at all." 482 U.S. at 13.

In summary, the *Turnbow* decision, though posing a formidable obstacle to congressional aims, stands at the wrong edge of the tide. Notwithstanding Congress' express intent that ERISA encourage the growth and development of employee benefit plans, ERISA section 2(a), 29 U.S.C. § 1001(a), the lack of employer-sponsored health insurance is an increasingly severe national problem more than a dozen years after ERISA's enactment. *See* Employee Benefit Research Institute study, *Uninsured in the United States: The Nonelderly Population Without Health Insurance, 1986* (1988). The study shows that in 1986, *37 million* persons, representing approximately 18 percent of the civilian population under age 65 (nearly 1 out of 5), reported *no* health insurance coverage from any source; that this proportion was substantially *greater* than the percentage reporting no health insurance in the early 1980's; and that nearly 88% of the uninsured population were either themselves *workers* or lived in the families of workers, and the family income in about one-half of these cases was *less* than $15,000 per year. (EBRI study at 2-3). The *Turnbow* decision—which is indefensible on any ground—will not only deliberately undercut ERISA's preeminence over employer-sponsored health care plans, but will also exacerbate this shortfall of health insurance nationwide.

For the foregoing reasons, as well as the grounds advanced in the Petition and by the *amici curiae*, a writ of certiorari should issue to review the judgment and opinion of the Nevada Supreme Court.

Respectfully submitted,

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